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Docket No.

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In the Supreme Court of the United States

October Term, 1982

FRED HICKS, JR.,
Petitioner

v.

APEX MARINE CORPORATION,
Respondent

**PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

PETITIONER'S BRIEF

Louis H. Cohn, Esquire
1655 Virginia National Bank Bldg.
Norfolk, Virginia 23510

Ermlich & Radin, P.C.
Suite 500 Holiday Inn Scope
Norfolk, Virginia 23510

QUESTION PRESENTED

Was the petitioner denied his right to trial by a jury as afforded him by the Seventh Amendment of the Constitution of the United States, as a result of the Trial Court's questioning of the witnesses?

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1983

No. _____

Fred Hicks, Jr.,
Petitioner,

v.

Apex Marine Corporation,
Respondent

Petition for a Writ of Certiorari to
the Court of Appeals
for the Fourth Circuit

The Petitioner prays that a writ of certiorari issue to review the judgment of the Fourth Circuit Court of Appeals, entered in the above case on March 14, 1983.

OPINIONS BELOW

The opinion of the United States District Court, Eastern District of Virginia, Norfolk Division, is not reported.

The opinion of the United States Court of Appeals for the Fourth Circuit is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was made and entered on March 14, 1983, and a copy is appended to this petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

**That part of the Seventh Amendment
to the Constitution of the United
States of America, which provided:**

**In suits at common law, where
the value in controversy exceeds
twenty dollars, the right of
trial by jury shall be preserved,
and no fact tried by a jury shall
be otherwise re-examined in any
court of the United States,
than according to the rules of
the common law.**

STATEMENT OF THE CASE

This appeal involves a maritime personal injury proceeding under the Jones Act before the United States District Court, Eastern District of Virginia, Norfolk Division, Judge Robert G. Doumar presiding.

The petitioner was allegedly injured in an accident on board the respondent's vessel on October 18, 1980. Although the accident was reported the injury was not reported until some eight months later when the petitioner sought medical attention at the United States Public Health Service Hospital, Norfolk, Virginia. The material allegations contained in the petitioner's Complaint were denied by the respondent and the case was tried before a jury.

During the proceedings a motion for mistrial was made on behalf of the petitioner which was denied. The case was then submitted to the jury and the jury returned a verdict for the respondent, a motion for new trial was made and denied, whereupon an appeal was taken to the Fourth Circuit Court of Appeals which affirmed the decision of the Trial Court on March 14, 1983.

REASONS FOR GRANTING THE WRIT

Fred Hicks, Jr., the petitioner herein, was allegedly injured on the respondent's vessel. However, the accident was not immediately reported and medical treatment for the specific injuries complained of was not received until many months after the accident. Although the respondent, ship owner, was not able to offer any evidence as to the accident itself it did offer the testimony of a neurologist to show that the petitioner's claim was fabricated. Thus, although there was testimony from an alleged eye witness, the credibility of the witnesses testifying on behalf of the petitioner was most certainly the primary concern of the jury.

The sole complaint presented by

this appeal concerns the conduct of the Trial Court in questioning the witnesses. The Trial Court examined each of the petitioner's witnesses in such a way as to impress upon the jury the quality of the respondent's case. The Trial Court did not examine the respondent's witness, Dr. Levy. Yet, when the petitioner's witness, Dr. Ford, in effect contradicted Dr. Levy's testimony the Trial Court examined him on its own. Later, out of the hearing of the jury the Court stated:

Transcript Page 17:

"The reason I've got the Doctor out of here -- and I can see where I began to get into a problem -- because I couldn't feel like I was getting any answer from Dr. Ford. Now, I may have gone too far, and I really realize that."

The above quoted language of the Trial Court followed a suggestion by counsel for the petitioner, also made out of the hearing of the jury.

Transcript Page 16:

"Your Honor, when I was cross-examining Dr. Levy, I apparently misquoted a question to him.

Your Honor corrected me on it, framed it. I believe Your Honor did the same to Dr. Ford. I didn't have His Honor to correct the situation."

Later in the trial, during the testimony of Dr. Williams, a physician called by the respondent but initially retained by the petitioner, the Trial Judge again examined the witness to bring out testimony from that witness to impress the respondent's case upon the jury.

Transcript Page 22:

"THE COURT: You saw him initially at the request of Mr. Ermlich.

THE WITNESS: Yes.

THE COURT: The plaintiff's attorney?

THE WITNESS: Yes.

THE COURT: Doctor, you are a board-certified neurologist?

THE WITNESS: That's right.

THE COURT: And that means you have a specialty in neurology of at least five years' standing; isn't that correct?

THE WITNESS: It means that -- It means that I have had a three-year training program, and then you are obligated to wait a year before you take board examinations for that licensure.

THE COURT: Now, Doctor, in relation to post-concussion syndrome, is that your headaches or pains are greater after the accident and then diminish?

THE WITNESS: That's --

THE COURT: Is that correct?

THE WITNESS; That's typical, yes.

THE COURT: It wouldn't be that they be so insignificant at the beginning and later increase later on several months later; is that correct?

THE WITNESS: That's correct."

This questioning of Dr. Williams was not based on the testimony previously given but was in effect an effort by the Trial Court to bring out a point regarding the witness' testimony. The fact that this point was not based on any testimony previously

given and produced an answer detrimental to the petitioner's position clearly prejudiced the petitioner's case. Furthermore, the Trial Court acknowledged its error as indicated by the following portion of the transcript of the trial proceedings.

Transcript Pages 23 & 24:

"Well, you may well be right, Mr. Radin. You can ask the Court of Appeals about it, because I'm not going to grant a mistrial, but I'll be happy to give any instruction to the jury, or call Dr. Williams back, that you think would suffice to cure your problems,--"

Furthermore, the Trial Court in effect indicated, beyond the presence of the jury, that it just did not believe the testimony of the petitioner's medical

expert. (Transcript Pages 24 & 25)

Obviously, the Trial Court was not able to contain these feelings as to the petitioner's witnesses but expressed same to the jury.

In Quercia v. United States, Mr. Chief Justice Hughes, in commenting on the responsibility of the Trial Judge in the Federal Court offered a guide which the Trial Judge in the instant proceeding did not follow.

Mr. Chief Justice Hughes in Quercia v. United States, supra, wrote:

"This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon the testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is

too important to be left without safeguards against abuses. The influence of the trial judge on the jury" 'is necessarily and properly of great weight'" and" his lightest word or intimation is received with deference, and may prove controlling.'.."
53 S.Ct. 698,699

In Glasser v. United States, 62

S. Ct. 457,470, Mr. Justice Murphy

wrote:

"The judge conducting a jury trial in a federal court is 'not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct'. Quercia v. United States, 289 U.S. 466, 469, 53 S. Ct. 698, 77 L.Ed. 1321. Upon him rests the responsibility of striving for that atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding..."

The conduct of the Trial Judge in the instant proceeding rather than obtaining or providing an air of impartiality opposed an aura of prejudice upon the petitioner. The Trial Judge choose to interrogate the petitioner's

medical witnesses in a manner which clearly indicated his lack of confidence in those witnesses. The petitioner's case rested almost entirely on the testimony of his medical witnesses and the questioning of these witnesses by the Trial Court was totally unnecessary. There was no vague answers nor was there any inability of respondent's counsel to obtain the answers to questions he offered. The questions of the Trial Court were solely for the purpose of making a point that the Trial Court desired and such was not within the province of the Trial Court.

The language in the opinion of Bollenbach v. United States, 66 S.Ct. 402, 405, offered additional authority that the decisions of the Trial Court as well as the Court of Appeals for the Fourth Circuit were in error.

In Bollenbach v. United States, supra,

Mr. Justice Frankfurter wrote:

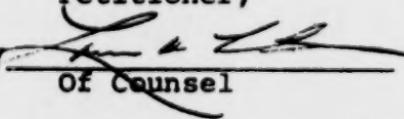
"..The influence of the trial judge on the jury is necessarily and properly of great weight,"
Starr v. United States, 153 U. S. 614, 626, 14 S.Ct. 919, 923, 38 L.Ed. 841, and jurors are ever watchful of the words that fall from him..."

The questioning of the Trial Judge in this case deprived the petitioner to his right of trial by jury.

CONCLUSION

For the reasons as set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

FRED HICKS, JR.,
Petitioner,

By 

Of Counsel

APPENDIX

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 82-1645

**Fred Hicks, Jr.,
Appellant,**

v.

**Apex Marine Corporation,
Appellee.**

**Appeal from the United States District
Court for the Eastern District of
Virginia, at Norfolk. Robert G.
Doumar, District Judge.**

**Argued February 10, 1983
Decided March 14, 1983**

**Before RUSSELL, MURNAGHAN, and
CHAPMAN, Circuit Judges.**

**M. J. Radin (Ermlich & Radin, P.C. on
brief) for Appellant; John R. Crumpler,
Jr. (Seawell, Dalton, Hughes & Timms
on brief) for Appellee.**

PER CURIAM:

In a Jones Act maritime personal injury proceeding, a jury trial resulted in a verdict for the defendant on which judgment was entered. The plaintiff, in appealing, has stated as his "sole complaint": "the conduct of the Trial Court in questioning the witnesses."

Under Rule 614 of the Federal Rules of Evidence, participation by the judge in the questioning of witnesses so that the truth may be ascertained is a matter of discretion. 10 J. Moore, Moore's Federal Practice Sec. 614.02 (2d Ed. 1982). Having reviewed the record in its entirety, we are satisfied that the questions put by the court did not exceed permissible limits nor deprive plaintiff of a fair trial. Cf. United States v. Billups, 692 F. 2d 320, 326-27 (4th Cir. 1982).

Furthermore, the district judge gave a curative instruction which effectively served to eliminate any prejudice of the sort plaintiff claims occurred:

The Court further wants to advise the jury that nothing the Court may say or do during the course of the trial is intended to indicate nor should be taken as indicating what your verdict should be. It is your verdict, and you are to decide the facts, not what the Court may think or whatever you think the Court may think.

The Court will instruct you as to the law and you decide the facts.

See United States v. Berardelli,
565 F. 2d 24, 30 (2d Cir. 1977).

Accordingly, the judgment is

AFFIRMED.

JUDGMENT ON JURY VERDICT

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-1041-N

FRED HICKS, JR.,)
)
)
 vs.) JUDGMENT
)
APEX MARINE CORPORATION)

This action came on for trial before
the Court and a jury, Honorable Robert
G.Doumar, United States District Judge,
presiding, and the issues having been
duly tried and the jury having duly
rendered its verdict,

It is Ordered and Adjudged that
the plaintiff take nothing, that the
action be dismissed on the merits, and
that the defendant, Apex Marine Corpora-
tion, recover of the plaintiff, Fred
Hicks, Jr., its costs of action.

Dated at Norfolk, this 17th day
of June, 1982.

W. FARLEY POWERS, JR.
Clerk of Court

BETH T. WINGROVE
Deputy Clerk

Approved:

ROBERT G. DOUMAR
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FRED HICKS, JR.,

Plaintiff,

v.

Civil Action No.
81-1041-N

APEX MARINE CORPORATION,

Defendant.

ORDER

This matter comes before the Court on the plaintiff's motion for a new trial filed pursuant to Rule 59 (a) of the Federal Rules of Civil Procedure. The defendant has filed a response to the plaintiff's motion. The motion is DENIED.

In his complaint, the plaintiff, a seaman, has alleged that, as a result of the defendant's negligence and unseaworthiness of its vessel to which the plaintiff has been assigned, he

sustained a serious injury on October 18, 1980. A trial by jury ensued. Using a special verdict form prepared and agreed to by the parties and approved by this Court, the jury found that an accident involving the plaintiff had not occurred on October 18, 1980, and that the plaintiff had sustained no injury whatsoever on that date. The jury's finding by means of special interrogatory was tantamount to a finding of no liability on the part of the defendant.

In his motion, the plaintiff requests a new trial on the ground that the Court had severely prejudiced the plaintiff when it questioned two expert medical witnesses, in that such questioning tended to discredit the plaintiff's witness. The plaintiff had earlier advanced a similar ground in support

of his motion for mistrial in relation to the interrogation of one of the witnesses. That motion was denied. In its response to the motion presently before the Court, the defendant does not specifically address the propriety of the Court's manner of interrogation, but argues instead that since the jury found no liability on the part of the defendant, it would not have considered the issue of damages within which the physicians' testimony would necessarily have been subsumed. Therefore, the Court's questioning was unconnected to the jury's findings, and no possible prejudice could have inured to the plaintiff.

The decision whether to grant or deny a new trial is a discretionary matter with the Court. Krodel v. Houghtaling, 468 F.2d 887 (4th Cir.1972) cert. denied 414 U.S. 829 (1973). To

warrant the ordering of a new trial on the stated ground, the moving party must show that the Court's questioning was so prejudicial as to have exceeded the bounds of its unique posture as the only disinterested lawyer in the case whose primary duty is to see that the relevant facts are adequately developed for the understanding of the jury.

Simon v. United States, 123 F.2d 80, 83 (4th Cir.) cert. denied, 314 U.S. 694 (1941).

Notwithstanding the Court's firm belief that its interrogation of the medical experts remained well within permissible bounds, the Court gave a prompt, cautionary instruction to the jury in order to ensure that no prejudice resulted to either party. Indeed, when the plaintiff moves for mistrial on the same ground, the Court declined to grant

such motion, but offered to give to the jury any reasonable cautionary instruction proposed by the plaintiff. Although given sufficient opportunity to prepare an appropriate instruction, the plaintiff submitted none to the Court. Nonetheless, the Court gave its own cautionary instruction, without objection, to the jury. The Court advised them that they should not consider the Court's questions or remarks as indicative of the Court's opinions as to any matter raised during the trial and that, in no event, should they be influenced in their decision of the facts by anything the Court said or did during the course of the proceedings.

The Court believes that its instructions clearly alleviated any possible prejudice which may have inured to the plaintiff as a result of its questioning

of these witnesses. See Rodriques v. Ripley, Inc., 507 F. 2d 278, 787 (1st Cir. 1974); Miles v. Sea-Land Service, Inc. 478 F. Supp. 1019, 1021 (S.D.N.Y. 1979) aff'd., 622 F. 2d 574 (2nd Cir.) cert. denied, 449 U. S. 954 (1980).

Having found no basis upon which to order a new trial in this action, the plaintiff's motion is hereby DENIED.

IT IS SO ORDERED.

ROBERT G. DOUMAR
United States
District Judge

At Norfolk, Virginia

July 13, 1982

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